DATE: November 18, 2003

In re:

SSN: ----------

Applicant for Security Clearance

ISCR Case No. 02-07414

DECISION OF ADMINISTRATIVE JUDGE

PHILIP S. HOWE

APPEARANCES

FOR GOVERNMENT

Jennifer I. Campbell, Esq., Department Counsel

FOR APPLICANT

Pro Se

SYNOPSIS

Applicant has multiple arrests and/or convictions for offenses that involved alcohol or illegal drugs. Applicant is not responsibly addressing his alcohol dependence. Applicant did not mitigate the security concerns. Clearance is denied.

STATEMENT OF THE CASE

On February 7, 2003, the Defense Office of Hearings and Appeals (DOHA), under Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR) to Applicant. The SOR detailed reasons under the personnel security Guideline J (Criminal Conduct), Guideline G (Alcohol Consumption), and Guideline E (Personal Conduct) why DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. The SOR recommended referral to an Administrative Judge to conduct proceedings and determine whether clearance should be granted, continued, denied, or revoked.

In a signed and sworn statement, dated March 5, 2003, Applicant responded to the SOR allegations. He requested a hearing. This case was originally assigned to Administrative Judge Joseph Testan in the Western Hearing Office on May 5, 2003. The case was reassigned to me on May 8, 2003, due to caseload considerations.

A Notice of Hearing was issued on May 27, 2003 setting the hearing for June 30, 2003. On that date, I convened the hearing to consider whether it is clearly consistent with the national interest to grant Applicant's security clearance. The Government presented ten exhibits which were admitted into evidence. The Government questioned the Applicant and presented one other witness. Applicant appeared and testified, presented four witnesses, and offered ten exhibits, eight of which were admitted into evidence. Exhibit E (Congressional letter on legislation responding to Applicant's letter of support) was not admitted, and neither was Exhibit J (polygraph results). I received the transcript (Tr.) of the hearing on

July 10, 2003.

FINDINGS OF FACT

He denied the allegations in subparagraphs 1.b., 1.e., 1.f., 1.h., 1.i., 2.c., and 3.a.. Applicant admitted the SOR allegations in subparagraphs 1.a., 1.c., 1.d., 1.g., 2.a., 2.b., 2.d., and 2.e. Those admissions are incorporated herein as findings of fact. After a complete and thorough review of the evidence in the record, and upon due consideration of the same, I make the following additional findings of fact:

Applicant is 44 years old. He is married, and has a total of four children. Applicant has two children by his present marriage, who are six and four years old. He met his present wife in February 1993 and they were married in October 1994. He works as a field service technician for a defense contractor. He seeks a security clearance for employment purposes. (Exhibit C; Tr. 33, 40, 44, 64, 67, 70, 71, 151 to 154)

Applicant was arrested in his hometown for driving while under the influence of alcohol, drugs, "vapors", and a "combination" on March 17, 2001. The case was dismissed on June 4, 2001. (Exhibit 8 at 2; Exhibit 9 at 5; Tr. 50,51) (see SOR paragraphs 1.a. and 2.a.)

Applicant was arrested for driving while under the influence in another town in his home state on March 31, 1991. Applicant pled guilty and was found guilty by the state court. He was sentenced to have his driving privileges suspended for 30 days, fined $1,100, and ordered to attend alcohol counseling sessions weekly for six months. (Exhibit 7 at 2; Exhibit 8 at 4, Tr. 49, 50) (see SOR paragraphs 1.c. and 2.b.)

Applicant was arrested on November 16, 1990, while riding in a car owned by a girl friend. The arrest was for possession of cocaine and marijuana. Applicant was found guilty by the state court, and sentenced to a four year intensive probation program under state law. The intensive probation program included a 180 day incarceration in the local jail. There were many other conditions as part of that probation. Applicant was taken into custody on July 7, 1992, to start serving his term of incarceration. Applicant successfully completed that program, and under state law, was allowed to petition the court for his conviction to be set aside. That petition was granted and Applicant's civil rights were restored. Applicant was not sentenced to a term of incarceration of four years under the terms of the court order. Applicant has not used illegal drugs since 1991, as a result of his girlfriend at that time dying of an overdose. (Exhibit A; Exhibit 2; Exhibit 3; Exhibit 4 at 3 to 19; Exhibit 7 at 2; Exhibit 8 at 1; Exhibit A at 1 to 5; Tr. 41, 47, 48, 71) (see SOR paragraphs 1.b and 1.d)

Applicant was arrested in 1987 for slapping a child, his putative daughter by a former girlfriend, on the face and leaving a slap mark. The charges were later dismissed. (Exhibit B; Exhibit 1, Exhibit 7 at 2; Exhibit 8 at 41; Exhibit B; Tr. 41, 65) (see SOR paragraph 1.e)

Applicant was arrested for driving while under the influence of alcohol (DUI) on July 13, 1985, in a town different than the town specified in paragraph 1.f. of the SOR. Applicant drove his car too fast and lost control. He went down a hill and hit a telephone pole. He was taken to a hospital, and later charged with DUI. (Exhibit 7 at 2; Exhibit 8 at 3; Tr. 37, 61) (see SOR paragraphs 1.f. and 2.c)

Applicant was arrested on October 6, 1984, for DUI in the town in which he lived. Applicant was convicted on January 25, 1985 of resisting an officer's arrest instead of the DUI. (Exhibit 7 at 2; Exhibit 8 at 4; Tr. 36) (see SOR paragraphs 1.g. and 2.d)

Applicant received non-judicial punishment under Article 15, UCMJ, on August 22, 1977, for possession of 8.98 grams of marijuana while on a military base. Applicant was ordered to forfeit $60 for two months and reduced to the grade of Airman. (Exhibit 10; Tr. 33) (see SOR paragraph 1.h)

Applicant admitted attending an alcohol counseling program at a community counseling center for eight months in 1991. Applicant resumed drinking after attending this counseling program. In 2003 Applicant underwent a psychological screening from a clinical psychologist. That professional reports Applicant's alcohol problem is less severe than in past times, but does recommend treatment. Applicant was found to have "Alcohol Dependence in

Sustained Partial Remission." The clinical psychologist approved Applicant's own current plan of attendance at community support groups like Alcoholics Anonymous (AA). Applicant stopped drinking two weeks before the hearing. Prior to that, he would consume alcohol at his home during dinner, particularly on weekends, often having four or five beers with dinner over several hours. Applicant admitted he would drink four to six beers, drive a car, and not feel impaired. He admitted he has a drinking problem. Applicant has a personal sponsor to help him keep away from drinking alcohol. That personal sponsor has seven years of abstinence from alcohol, and his wife and Applicant's wife are cousins. Applicant believes his personal sponsor and his belief in the Bible will keep him from drinking again. Applicant does not attend AA or other support groups. He attended AA a few years ago, but he did not find it to be the "right crowd for him". (Exhibit I at 1 to 4; Tr. 51 to 53, 56, 57, 72 to 78, 188 to 200, 212 to 215) (see SOR paragraph 2.e)

Applicant did not falsify his answer to Question 20 on the security clearance application (SCA) because it asked for any job terminations within the past 10 years. Applicant was terminated from his job at the Federal Bureau of Prisons in June 1990. Applicant completed his SCA on January 2, 2002. Ten years earlier from the SCA completion date would have made the time period start date in 1992. (Exhibit 6; Exhibit 8 at 2; Tr. 58, 59, 219)

POLICIES

"[N]o one has a 'right' to a security clearance." *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988). As Commander in Chief, the President has "the authority to . . . control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position . . . that will give that person access to such information." *Id*. At 527.The president has restricted eligibility for access to classified information to United States citizens "whose personal and professional history affirmatively indicates loyalty to the United States, strength of character, trustworthiness, honesty, reliability, discretion, and sound judgement, as well as freedom from conflicting allegiances and potential for coercion, and willingness and ability to abide by regulations governing he use, handling, and protection of classified information." Exec. Or. 12968, *Access to Classified Information* § 3.1(b) (Aug. 4, 1995). Eligibility for a security clearance is predicted upon the applicant meeting the security guidelines contained in the Directive.

The adjudication process is based on the whole person concept. All available, reliable information about the person, past and present, is to be taken into account in reaching a decision as to whether a person is an acceptable security risk. Enclosure 2 to the Directive sets forth adjudicative guidelines that must be carefully considered according to the pertinent Guideline in making the overall common sense determination required.

Each adjudicative decision must also include an assessment of:

(1) the nature, extent, and seriousness of the conduct;

(2) the circumstances surrounding the conduct, and the extent of knowledgeable participation;

(3) how recent and frequent the behavior was;

(4) the individual's age and maturity at the time of the conduct;

(5) the voluntariness of participation;

(6) the presence or absence of rehabilitation and other pertinent behavioral changes;

(7) the motivation for the conduct;

(8) the potential for pressure, coercion, exploitation, or duress; and

(9) the likelihood of continuation or recurrence (See Directive, Section E2.2.1. of Enclosure 2).

Because each security case presents its own unique facts and circumstances, it should not be assumed that the factors

exhaust the realm of human experience or that the factors apply equally in every case. Moreover, although adverse information concerning a single condition may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or other behavior specified in the Guidelines.

Initially, the Government must establish, by substantial evidence, that conditions exist in the personal or professional history of the applicant which disqualify, or may disqualify, the applicant from being eligible for access to classified information. *See Egan*, 484 U.S. at 531. All that is required is proof of facts and circumstances that indicate an applicant is at risk for mishandling classified information, or that an applicant does not demonstrate the high degree of judgment, reliability, or trustworthiness required of persons handling classified information. ISCR Case No. 00-0277, 2001 DOHA LEXIS 335 at **6-8 (App. Bd. 2001). Once the Government has established a *prima facie* case by substantial evidence, the burden shifts to the applicant to rebut, explain, extenuate, or mitigate the facts. *See* Directive ¶ E3.1.15. An applicant "has the ultimate burden of demonstrating that is clearly consistent with the national interest to grant or continue his security clearance.: ISCR Case No. 01-20700 at 3 (App. Bd. 2002). "Any doubt as to whether access to classified information is clearly consistent with national security will be resolved in favor of the national security." Directive ¶ E2.2.2. "[S]ecurity clearance determinations should err, if they must, on the side of denials." *Egan*, 484 U.S. at 531. See Exec. Or. 12968 § 3.1(b).

Based upon a consideration of the evidence as a whole, I find the following adjudicative guidelines most pertinent to an evaluation of the facts of this case:

Guideline J - Criminal Conduct

The Concern: A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness. E2.A10.1.1.

Conditions that could raise a security concern and may be disqualifying include:

(1) Allegations or admissions of criminal conduct, regardless of whether the person was formally charged. E2.A10.1.2.1.

(2) A single serious crime or multiple lesser offenses. E2.A10.1.2.2.

Conditions that could mitigate security concerns include: E2.A10.1.3.

(1) The criminal behavior was not recent. E2.A10.1.3.1.

(6) There is clear evidence of successful rehabilitation. E2.A10.1.3.6.

Absent a waiver from the Secretary of Defense, the Department of Defense may not grant or continue a security clearance for any applicant who has been sentenced by a U.S. court to confinement for more than a year. 10 U.S.C. § 986 (Smith Amendment)

Guideline G - Alcohol Consumption

The Concern: Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness. E2.A7.1.1.

Conditions that could raise a security concern and may be disqualifying include:

(1) Alcohol-related incidents away from work, such as driving while under the influence. E2.A7.1.2.1.

(3) Diagnosis by a credentialed medical professional (e.g., clinical psychologist) of alcohol

dependence. E2.A7.1.2.3

Conditions that could mitigate security concerns include:

(3) Positive changes in behavior supportive of sobriety. E2.A7.1.3.3.

Guideline E - Personal Conduct:

(A) *The Concern*: Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.

(B) Conditions that could raise a security concern and may be disqualifying include:

(2) The deliberate omission, concealment, falsification or misrepresentation of relevant and material facts from any personnel security questionnaire, personal history statement or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities; E2.A5.1.2.2.

(C) Conditions that could mitigate security concerns include:

(1) The information was . . . not pertinent to a determination of judgment,

trustworthiness, or reliability; E2.A5.1.3.1.

Under the provisions of Executive Order 10865, as amended, and the Directive, a decision to grant or continue an applicant's clearance may be made only upon an affirmative finding that to do so is clearly consistent with the national interest. In reaching the fair and impartial overall common sense determination required, I can only draw those inferences and conclusions which have a reasonable and logical basis in the evidence of record. Likewise, I have drawn no inferences based on mere speculation or conjecture.

CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all appropriate legal precepts, factors, and conditions above, I conclude the following with respect to each allegation set forth in the SOR:

With respect to Paragraph 1 and Guideline J, two Disqualifying Conditions (DC) in the guideline apply: DC 1 (*Allegations or admissions of criminal conduct, regardless of whether the person was formally charged*) and DC 2 (*a single serious crime or multiple lesser offenses*). Between 1977 and 2001 Applicant was arrested and/or convicted of eight offenses involving drugs or alcohol. One of those convictions, in 1990, saw Applicant convicted in state court of drug offenses and sentenced to four years of intensive probation. Part of that intensive probation program included a jail sentence of 180 days. My reading of the record evidence in Exhibit 4 makes it clear to me that Applicant was not sentenced to imprisonment for a term exceeding one year. Therefore, that sentence makes the Smith Amendment prohibitions inapplicable to Applicant's case, regardless of what the Applicant and the Government may have understood from the testimony at the hearing. An examination of both the presentencing recommendations and the state court order contained in Exhibit 4 make it quite evident the Court did not order four year's imprisonment. Therefore, the Smith Amendment prohibition on granting a security clearance does not apply. I find for Applicant on subparagraph 1.i.

I do not find any Mitigating Conditions (MC) apply in this case.

Regarding Paragraph 2 and Guideline G, DC 1 (*alcohol-related incidents, such as DUI*) and DC 3 (*diagnosis by a credentialed medical professional, which includes a clinical psychologist, of alcohol dependence*) apply. Applicant got his own evaluation by a clinical psychologist, which showed he has an alcohol dependence problem in remission, with recommendations for attendance at AA, or similar organizations. It is important that Applicant attended a counseling program in 1991 and yet resumed drinking. With his arrest record, he continued drinking over the years. Even after his arrest in 2001, he continued to drink alcohol. He only stopped drinking two weeks before the hearing, and asked his

friend, to whom he is related by marriage (his wife and Applicant's wife are cousins) to be his personal sponsor. He is using his religious beliefs and this personal sponsor to establish and maintain sobriety. But the clinical psychologist based his recommendations on the assumption Applicant was attending and would continue to attend AA meetings regularly. Applicant does not attend AA.

Only MC 3 (*positive changes in behavior supportive of sobriety*) could apply. Applicant has made positive changes in his life, but some were forced upon him, such as aging and maturing over time. He appears to have made a good marriage to a good woman, and they have two young children to support, so those facts focus his actions and thinking more positively than in the past.

However, he does have a diagnosis from a clinical psychologist that he is alcohol dependent, though in remission. But Applicant has not had 12 months of alcohol abstention, frequent attendance and participation in AA or a similar program, successfully completed an inpatient or outpatient rehabilitation program, and received a follow-on favorable prognosis from a credentialed medical professional. Applicant's past record of being in a counseling program in 1991 and then resuming drinking, with another DUI arrest in 2001, and then his admitted continued drinking until two weeks prior to the hearing cause concern. Applicant also admitted he would drink four to six beers and drive his automobile, and not consider himself impaired. He admitted he has a drinking problem, and was vague in other answers on the extent of his alcohol problem.

I did not find his answers credible on his true relationship with alcohol. I do not find that his sobriety is long enough in duration to mitigate his alcohol dependence. I do not find Applicant has a sufficient support network to maintain sobriety based upon the lengthy duration of his alcohol problem. I also find Applicant has not adhered to the plan he presented to the clinical psychologist and which was recorded in that person's evaluation of Applicant. Applicant, for example, has not attended and apparently does not plan on attending AA or a similar program. Therefore, my finding on this guideline is against Applicant.

Considering Paragraph 3 and Guideline E, I conclude the Government did not establish by substantial evidence the allegations as set forth in subparagraphs 3.a. of the SOR. The Government conceded that Applicant complied with the instructions for Question 20 of the SCA, and did not have to provide the information on a job termination more than 10 years ago. Therefore, I find for Applicant on that guideline.

FORMAL FINDINGS

Formal Findings as required by Section E3.1.25 of Enclosure 3 of the Directive are hereby rendered as follows:

Paragraph 1 Guideline J: Against Applicant

Subparagraph 1.a.: Against Applicant

Subparagraph 1.b.: Against Applicant

Subparagraph 1.c.: Against Applicant

Subparagraph 1.d.: Against Applicant

Subparagraph 1.e.: Against Applicant

Subparagraph 1.f.: Against Applicant

Subparagraph 1.g.: Against Applicant

Subparagraph 1.h.: Against Applicant

Subparagraph 1.i.: For Applicant

Paragraph 2 Guideline G: Against Applicant

Subparagraph 2.a.: Against Applicant

Subparagraph 2.b.: Against Applicant

Subparagraph 2.c.: Against Applicant

Subparagraph 2.d.: Against Applicant

Subparagraph 2.e.: Against Applicant

Paragraph 3 Guideline E: For Applicant

Subparagraph 3.a.: For Applicant

DECISION

In light of all the circumstances and facts presented by the record in this case, it is not clearly consistent with the national interest to grant or continue a security clearance for Applicant. Clearance is denied.

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Philip S. Howe

Administrative Judge